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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KAWAN WILLIAMS et al.,

Defendants and Appellants.

D051882

(Super. Ct. No. SCD206784)

APPEALS from judgments of the Superior Court of San Diego County, Roger W. Krauel, Judge. Affirmed.

In this home invasion robbery case which included charges each appellant was a felon in possession of a firearm, the trial court properly sanitized appellants' prior felonies as required by *People v. Sapp* (2003) 31 Cal.4th 240, 260-261, and *People v. Valentine* (1986) 42 Cal.3d 170, 181-182. Moreover, the trial court did not err in permitting a police officer to testify to a witness's out-of-court identification of appellants when the witness's in-court testimony was inconsistent with his prior definitive

identification of appellants. Because appellants assert no other errors, we affirm their convictions.

FACTUAL BACKGROUND

On the morning of May 24, 2007, Richard Gonzalez was at home with two friends, Fathy Abdusalam and Manuel Gastelum. Someone knocked on the door, and when Gonzalez went to the door a black male was there and offered to sell Gonzalez CD's. Gonzalez was not interested, but asked Gastelum if Gastelum wanted any CD's. Gastelum opened the screen door of the house, and when he did another shorter black male appeared and put a semi-automatic handgun on Gastelum's neck, and both black males force their way into the house.

Once inside the house, the shorter invader yanked gold chains off Gastelum's and Gonzalez's necks. The shorter invader then took Abdusalam's cell phone from the dining room table and demanded money. Next, the shorter invader handed his gun to the taller invader, who held the gun on the three victims while the shorter invader ransacked Gonzalez's sister's bedroom.

At some point, the first two invaders were joined by a third participant who appeared to be Hispanic. The Hispanic-looking invader demanded money from Gonzalez and engaged Gonzalez in a verbal confrontation. Eventually, the Hispanic-looking invader and Gonzalez went into the back yard and began fighting. The fight permitted Gonzalez to run out a gate and into the street where he called to a neighbor for help. The neighbor called police. As he was running from the scene, Gonzalez saw a white Mustang parked in front of his house with a "chubby guy" sitting in the car. The

neighbor also saw the Mustang and two black males and one other male get into the car and drive away.

Approximately one-half hour later, police stopped a Mustang matching the description given to them by Gonzalez and his neighbor. Appellant Kawan Williams was driving the car and appellant Richard Alvin Bennett was a passenger. Inside the car, police found two gold necklaces with broken clasps. Inside Williams's pocket, the police found an ink cartridge similar to the one that had been in the bedroom ransacked during the invasion.

At a curbside lineup, both Gonzalez and Gastelum positively identified Williams and Bennett as two of the three invaders. Gonzalez identified Bennett as the person who came to his door selling CD's and Williams as the person who ransacked his sister's bedroom. Both Gonzalez and Gastelum identified the gold necklaces as ones taken during the robbery.

Abdusalam was also at the curbside lineup. He was not able to make any positive identification, but stated that Bennett looked like the taller robber who was selling CD's and Williams looked like the shorter robber.

Williams and Bennett were both charged with three counts of robbery, and in separate counts they were alleged to have been felons in possession of a fire arm.

Trial commenced on September 17, 2007, four months after the robbery. At trial Williams and Bennett moved to have the firearm possession charges tried after trial of the robbery counts. The trial court denied the motion to bifurcate, and in light of the trial court's ruling both appellants stipulated that at the time of the robbery they were both

felons. Without describing the nature of appellants' felony convictions, the trial court instructed the jury that for purposes of considering the firearm possession charges appellants were felons.

At trial, both Gonzalez and Gastelum were unable to identify either Williams or Bennett. In particular, Gonzalez stated that he had not been able to positively identify appellants as the perpetrators at the curbside lineup. In light of Gonzalez's testimony, the trial court permitted the prosecution to call one of the detectives who was present at the curbside lineup. The detective testified that when he interviewed Gonzalez at Gonzalez's home, Gonzalez stated he would be able to identify the robbers if he saw them and that at the lineup Gonzalez positively identified Bennett as the robber who was selling CD's and Williams as the robber who went into his sister's bedroom.

The jury found both Williams and Bennett guilty. Bennett moved for a new trial on the grounds the trial court erred in permitting the detective to testify as to Gonzalez's curbside identification. The trial court denied Bennett's motion for a new trial.

DISCUSSION

I

On appeal both Williams and Bennett renew their contention the trial court erred in failing to bifurcate trial of the weapons possession offenses from trial of the underlying robberies. They concede, as they must, that we are bound by the holding in *People v. Sapp, supra*, 31 Cal.4th at pages 260-261, and raise the bifurcation issue on appeal in order to preserve it for federal review. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 635; *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1226.)

Article I, section 28, subdivision (f)(4) of the California Constitution was added to the Constitution by Proposition 8, an initiative the California electorate passed in 1982, and it states: "When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court."¹ This constitutional requirement was directed at the holding in *People v. Hall* (1980) 28 Cal.3d 143, 153-154, which permitted defendants to stipulate to prior felonies and avoid any reference to those convictions at trial. (See *People v. Valentine, supra*, 42 Cal.3d at p. 177.) In light of article I, section 28, subdivision (f)(4), a trial court's ability to prevent a jury from learning about a prior felony conviction when such a felony is an element of a charged offense, is limited. (*Ibid.*) Following adoption of Proposition 8, a trial court has discretion to *sever* a weapons possession count from other charges in the interests of justice (see *People v. Sapp, supra*, 31 Cal.4th at 261-262), as well as the power to accept a stipulation that, without making any reference to the nature of the felony, the jury will be instructed the defendant has suffered a prior felony conviction. (*Ibid.*) However, a trial court has no power to *bifurcate* a current trial as a means of preventing a jury from learning hearing about a prior felony conviction. (*People v. Sapp, supra*, 31 Cal.4th at p. 262.) When a prior conviction is a substantive element of a current charge: "Either the prosecution proves each element of the offense to the jury, or the defendant stipulates to the conviction and the court 'sanitizes' the prior by telling the jury that the defendant has a prior felony conviction, without specifying the nature of the felony committed." (*Ibid.*)

¹ This provision was initially adopted as article I, section 28, subdivision (f). It was readopted as article I, section 28, subdivision (f)(4), at the November 4, 2008, election.

These are the two options the trial court offered the appellants.² Accordingly, there was no error. (*Ibid.*)

II

Appellants argue the trial court erred in permitting the prosecution to introduce into evidence statements Gonzalez made at the curbside lineup and that accordingly Bennett's motion for a new trial should have been granted. We find no error.

The detective who interviewed Gonzalez at his home and took him to the lineup testified that before presenting appellants to Gonzalez, he admonished Gonzalez with the following statement, from a pre-printed form: " 'I want you to look at someone we have detained. Do not conclude from the fact that we have detained someone that he or she is a guilty party. You are not obligated to identify anyone. It is just as important to free an innocent person as to identify the guilty person. Be aware that sometimes people who commit crimes will try to disguise their appearance by changing clothes, wearing different hats, sunglasses, or wigs.

" 'Do not say anything or make any gestures, nod, point or et cetera until you have totally viewed this person.' " According to the detective, after giving Gonzalez this admonishment, he further advised Gonzalez that he wanted Gonzalez to be absolutely sure that the individuals who were being presented were the ones who entered Gonzalez's home and that Gonzalez would tell him in his own words if he was not sure.

² Appellants made no motion to sever.

While the detective and Gonzalez were in a patrol car, Williams and Bennett were walked about 30 feet in front of the car. When Gonzalez saw Bennett, he told the detective: "Yes, that's him. He is the one that was at the front door selling the CD's." When Gonzalez saw Williams, he told the detective: "That's him. He's the one who had the gun and went into my sister's bedroom." At the curbside lineup, Gonzalez further identified Williams with the following statement: "He's the one that gave the gun to the first guy that came into the house."

At trial four months later, Gonzalez testified that he had not positively identified the appellants at the curbside lineup. With respect to his curbside identification of Bennett, Gonzalez testified: "I told him I didn't know if it was him; but as soon as he pulled out the sweater, I recognized the sweater. And then he pulled out all the chains that had been snatched, and I told him that was the necklaces." When asked whether Williams was at the curbside lineup, Gonzalez testified: "I don't know. Because the second person that they had in the lineup was a little farther, and they didn't really get close to him. So I didn't -- and he was facing -- his back was facing us. Like, when they told me -- I guess when they told him to look towards us, he was -- I was just, like, shown the side of his face." Upon further examination, Gonzalez did expressly concede that he had in fact identified both Bennett and Williams at the curbside lineup. When asked to identify the appellants in court, Gonzalez testified: "I don't recognize them. Like, it's just been so long that -- man, I don't even know who they were, you know what I mean?"

As employed in Evidence Code section 1235, which allows admission of the prior inconsistent statements of a witness, Gonzalez's testimony at trial was plainly

inconsistent with his statements to the detective at the scene of the curbside lineup.

"Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation]" (*People v. Green* (1971) 3 Cal.3d 981, 988; accord *People v. Johnson* (1992) 3 Cal.4th 1183, 1219.) Notwithstanding Gonzalez's express concession that he had identified both appellants at the curbside lineup, at trial Gonzalez plainly attempted to nonetheless suggest he was not able to positively identify either appellant at the curbside lineup. Thus the import of his trial testimony—that his curbside identification was not certain—directly contradicted the positive identification he gave the detective at the curbside lineup after having been admonished that he need not make any identification. The trial court committed no error in admitting Gonzalez's curbside identification.

Judgments affirmed.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.